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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator
de bonis non of the Estate of L. E.
Haney, Deceased,

Petitioner,

vs.

J. M. KURN et al., Trustees of ST.
LOUIS-SAN FRANCISCO RAILWAY
COMPANY, Debtor, and ILLINOIS
CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

SEPARATE BRIEF

Of Respondents, J. M. Kurn et al., Trustees of
St. Louis-San Francisco Railway Company,
Debtor, in Opposition to Petition for
Writ of Certiorari.

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STATEMENT.

For convenience and brevity these respondents, J. M. Kurn et al., Trustees of St. Louis-San Francisco Railway Company, Debtor, will be referred to as "Trustee defendants," their co-respondent, Illinois Central Railroad Company as "Illinois Central," and petitioner as "plaintiff."

The decision of the Supreme Court of Missouri, 189 S. W. (2d) 253 (R. 320-331), in our opinion states the facts more favorably to plaintiff than the record warrants. This is particularly true as to the statement

"It could be inferred from the facts that Haney could have been struck by the mail hook knob if he were standing on the south side of the mound and the mail hook extended out as far as 12 or 14 inches," 189 S. W. (2d) 253, l. c. 255 (R. 325). However, the holding of said Court that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is so obviously sound and in harmony with the applicable decisions of this Court that Trustee defendants, for the purposes of this brief, will not burden the Court with citations and quotations from the record which we contend show the decision more favorable to plaintiff than warranted in the respect above pointed out.

Comment on erroneous statements in plaintiff's petition for certiorari and brief in support thereof, and further comment on the facts will be reserved for the argument.

GROUND S URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. The writ should be denied for the reason that neither plaintiff's petition for writ of certiorari nor the supporting brief are direct and concise and contain no direct, accurate or concise statement of fact, in violation of Section 2, Rule 38 of this Court, and the decisions therein cited (306 U. S. 716).

II. Because the holding of the Supreme Court of Missouri that it would be mere speculation and conjecture to say that Haney was struck by the mail hook is in harmony with the applicable decisions of this Court.

Brady v. Southern Ry. Co., 320 U. S. 476;

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472;

Kansas City Southern Ry. v. Jones, 276 U. S. 303;

New Y. C. R. Co. v. Ambrose, 280 U. S. 486, 490;

Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351;

Atchison etc. Ry. v. Saxon, 284 U. S. 458;

Penn. R. R. Co. v. Chamberlain, 288 U. S. 333.

ARGUMENT.

I.

The petition should be denied because petitioner failed to comply with Rule 38 of this Court.

Section 2 of Rule 38 of this Court provides that a petition for certiorari shall contain a summary and short statement of the matter involved, and that the supporting brief must be direct and concise. Neither the statement of fact contained in the petition nor the statements contained in the supporting brief comply with this Rule in that such statements are not direct, concise or accurate.

As to the contention that said petition and supporting brief do not contain the direct and concise statements required by said Rule, this Court will reach its conclusion from an inspection thereof. As to the contention that said statements are inaccurate, we desire to comment briefly.

In a number of places throughout the petition and supporting brief plaintiff's counsel, in referring to the mail hook, used expressions such as "hung down loose," "not fastened at the bottom," and "swinging loose." These expressions are not in and of themselves inaccurate, but they may be somewhat misleading unless the Court bears in mind a matter which plaintiff's counsel failed to mention, namely, that there was no charge and not one iota of evidence that the mail hook in question was defective, or that it was in any way different from the regular standard mail hook to be found on mail cars throughout the country.

At the top of page 18 of the petition, following the assertion that the evidence tended to show that deceased was struck by "a mail hook swinging loose," plaintiff's counsel said: "There was no evidence of any kind that anything else could have killed Haney." This statement is more than misleading. It is definitely inaccurate.

There was substantial evidence that Haney was struck in the back of the head with a pipe or other blunt instrument in an attempt to rob him. His pistol was out of its holster and lying under his body (R. 90, 111). The police homicide squad made an investigation. They were present the next morning when pictures were taken at the location where Haney's body was found, and we ask the Court at this point to examine those pictures, which are set out opposite page 120 of the record, and to refer particularly to the picture marked "Defendant's Exhibit B," and the testimony explanatory thereof (R. 111, 112).

Plaintiff's witness, Dr. Turner, who helped perform the autopsy, testified as follows:

"Q. And it is very possible then in your opinion and judgment that this man could have suffered a blow by some, maybe, gas pipe or club or some similar round object? A. Yes.

Q. Also in the hands of some individual? A. Yes, it could be" (R. 288).

The Supreme Court of Missouri, in referring to the record in this connection, said:

"It appears in the record that the area immediately about the switch was not very well lighted, was dark, and that at night, in this area, many hoboes and tramps, white and colored, 'hop freight trains and get rides out of there.' Such situation was likely the reason for Haney having a pistol. The police homicide squad made an investigation of Haney's death and the measurement referred to, supra, in the evidence of Bruso, was made by the police in Bruso's presence. Six days after Haney was killed his billfold was found on a high board fence railing about a block from the place where Haney was killed. It contained no money, but contained Haney's social security card and other things. The billfold was not soiled: 'it did not appear to have been lying out in the rain or snow.' It was

found near the place where Haney was placed in the ambulance. Haney had a gold watch and a diamond ring. These were 'still on him at the hospital. He never carried much money, not very much more than \$10' " (189 S. W. [2d] 253, l. c. 257, R. 329).

Following the requirements in Section 2 of Rule 38 pertaining to a petition for writ of certiorari and supporting brief, this Court cites a number of cases holding that, "A failure to comply with these requirements will be a sufficient reason for denying the petition." Most frequently cited among these cases is *Furness, Withy & Co. v. Yang-Tsze Ins. Ass'n.*, 242 U. S. 430, in which this Court, in speaking of petitions for certiorari, at page 434 of the opinion, said:

"Unless these are carefully prepared, contain **appropriate** references to the record and present with **studied accuracy, brevity and clearness** whatever is essential to ready and adequate understanding of points requiring our attention, the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its dockets."

II.

The holding of the Supreme Court of Missouri that the evidence was insufficient to show that the mail hook struck Haney except by resorting to speculation and conjecture is in accordance with the applicable decisions of this Court.

In our "Grounds Urged in Argument in Opposition to Petition for Writ of Certiorari" we have cited a number of decisions of this Court on this point. We shall omit quotations regarding the particular facts and holdings in these cases. They contain the applicable principles of law and hold, as did the Supreme Court of Missouri in the instant case, that verdicts cannot be based upon speculation

and conjecture. We submit that the facts in each of these cases were more favorable to the plaintiff than in the instant case.

Even though it could be found without resorting to speculation and conjecture that the mail hook struck Haney, what would be the actionable negligence of Trustee defendants? The mail car was next to the engine, and as this train of twelve cars backed into the station it was the ~~eleventh~~ ^{twelfth} car to pass Haney (R. 145, 149). There is no charge, and there is not a scintilla of evidence that the mail hook was defective, or that the track was defective, or that the train was backing at a dangerous or unusual speed.

CONCLUSION.

It is respectfully submitted that the decision of the Supreme Court of Missouri is in accordance with the applicable decisions of this Court, and that the petition for writ of certiorari should be denied.

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